STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

CONNIE MAE APFEL,

Defendant-Appellant

On appeal from the Circuit Court for St. Croix County,

The Honorable Edward F. Vlack, presiding

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

CONNIE MAE APFEL

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

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Whether, a prior statement of a witness to the effect that "I did not consent to being hit by the defendant" may come into evidence in a case of misdemeanor battery, as a "prior inconsistent statement," when that witness was never asked "did you consent to the defendant hitting you" and never testified to that particular factual issue?

Whether, a prior statement of a witness to the effect that "I felt pain when hit by the defendant" may come into evidence in a case of misdemeanor battery, as a "prior inconsistent statement," when that witness was never asked "did you feel pain when the defendant hit you" and never testified to that particular factual issue?

IV. Statement on oral argument and publication.

This case involves the application of existing law to facts that are not in dispute. The Appellant/Defendant does not request oral argument or publication.

V. Statement of the case and facts.

This case comes upon Ms. Apfel's convictions after trial for the crimes of misdemeanor battery and disorderly conduct, (R.33), and the denial of Ms. Apfel's motion for post-conviction relief. (R.70). In her motion Ms. Apfel requested a new trial on the grounds that certain testimony of two police officer witnesses was inadmissible hearsay. (R.63). That testimony, which was objected to at trial, was to the effect that the victim/witness had told the police officers that Ms. Apfel had hit the victim/witness C.A..; that he did not consent to being hit; and that he felt pain when hit. *Id.* Ms. Apfel asserted in her motion for post-conviction relief, and continues to assert, that the circuit court erred in ruling that this testimony was admissible as "prior inconsistent statements" of the victim/witness C.A., because the State never laid a proper foundation for admitting such testimony. *Id.* Specifically, the State never asked C.A. if Ms. Apfel had hit him, whether he consented to being hit by Ms. Apfel, or whether he felt pain when hit when by Ms. Apfel. (R.63). Ms. Apfel contends that for a statement to be admitted as a prior inconsistent statement, there has to be some statement at trial for that prior statement to be inconsistent with.

On April 21, 2014, a criminal complaint was filed in the circuit court for St. Croix County, Wisconsin, charging Connie Mae Apfel with three crimes. (R.2). The first count was for Misdemeanor Battery, Domestic Abuse, contrary to §§

940.19(1), 939.51(3)(a) and 968.075(1)(a), Wis. Stats. (R.2:1). The second count was for Disorderly Conduct, Domestic Abuse, contrary to §§ 947.01(1), 939.51(3)(a) and 968.075(1)(a), Wis. Stats. (R.2:2). The third count was for Possession of Drug Paraphernalia, PTAC, contrary to §§ 961.573(1) and 939.05(1), Wis. Stats. (R.2).

The central allegation of the battery charge was that Connie Apfel "on or about Saturday, March 29, 2014, in the City of River Falls, St. Croix County, Wisconsin, did cause bodily harm to [C.A.], by an act done with intent to cause bodily harm to that person, without that person's consent." (R.2:1). The central allegation of the disorderly conduct charge was that Connie Apfel "on or about Saturday, March 29, 2014, in the City of River Falls, St. Croix County, Wisconsin, while in a private place, did engage in abusive conduct, under circumstances in which such conduct tended to cause a disturbance." (R.2:1). C.A. was Connie Apfel husband, with whom she then resided and had children with. (R.51:105-06).

A jury trial on these charges was held on December 16, 2014. (R.51) The prosecution called three witnesses, the victim/witness C.A. (R.51:104-138), Officer Ryan Miller (R.51:139-167), and Officer Christopher Kober (R.51:167-77). Connie Apfel later testified in her own defense. (R.51:193-201).

The first witness to testify for the State was the victim/witness C.A. C.A.'s testimony was notable for his lack of recall to certain events of March 29, 2014.

The following are the portions of C.A.'s testimony relevant to this appeal (Mr. Hartung for the State questioning):

Q. [C.A.], do you want to be here today?

A. No, I don't.

Q. And do you want to testify against your wife?

A. No, I didn't. (sic)

Q. You care for your wife?

A. I love her very much.

Q. And this hard for you?

A. Absolutely.

Q. [C.A.], I recognize this is difficult, but I'd like to ask you about an incident that occurred on March 29th of 2014.

A. Yeah.

Q. Where were you living at that time?

A. In River Falls at a hotel.

Q. And who was staying with you?

A. Just my wife and I and my daughter and my granddaughter.

Q. And what's your granddaughter's name?

A. It's [E.A.].

Q. And how old is [E.A.]?

A. Four.

Q. Is she four currently today?

A. Absolutely.

Q. Would she have been three back on March 29th?

A. Pretty much.

Q. And on that day, the early morning of March 29th of 2014, did you call police officers?

A. Yes, I did.

Q. And why did you call the police?

A. Because I thought they'd serve and protect and help us out.

Q. Do you remember telling the police why you called them?

A. No, I don't.

Q. And did police arrive at your residence?

A. Yes they did.

Q. And they spoke to you?

A. Yes they did.

Q. Do you remember talking with them?

A. No I don't.

Q. Do you remember what you may have told them?

A. No I don't.

Q. [C.A.], on that evening do you remember police officers finding pipes in your hotel room?

A. No I don't.

Q. On that evening, had you been consuming alcohol?

A. Yes.

Q. Had you been smoking marijuana?

A. No.

Q. Did you observe Connie smoking marijuana?

A. Excuse me?

Q. Did you observe Connie smoking marijuana?

A. No.

Q. Would you have told the police something different on that night?

A. No.

Q. Did you and Connie get into an argument on that night?

A. Yes we did.

Q. What was that about?

A. I can't recall.

Q. Do you remember telling police officers what that was about?

A. I don't recall.

Q. Was there yelling?

A. I don't recall.

Q. Were you injured that night?

A. I - no, I wasn't.

Q. Would you have told police something different?

A. No.

Q. Did you have a cut above your eye?

A. I don't recall.

Q. Do you remember talking to officers about a cut above your eye?

A. No I don't.

Q. Was Connie mad at you on that night?

A. I don't recall.

Q. Do you remember if you spoke to officers about Connie using drugs on that night?

A. No, sir.

Q. [C.A.], have you ever been convicted of a crime?

A. Yes.

Q. How many times?

A. Ah, nine.

Q. On that night were both your daughter, [D.A.], and your granddaughter, [E.A.], with you in the hotel room?

A. Yes.

MR. HARTUNG: No further questions.

(R.51:107-10; A.-Appx. 15-18).

The trial transcript reflects that at no point during the State's direct examination was C.A. asked if Connie Apfel had struck or hit him. At no point did C.A. testify that he had been struck or hit by Connie Apfel. At no point did C.A. testify that he had no recollection of telling the officers that he had been struck or hit by Connie Apfel that evening. *Id.* On cross-examination, C.A. was asked by defense counsel the converse, namely whether *he*, C.A., had hit Connie Apfel, to which query C.A. testified that he had no recollection.[1] (R.51:136).

Further the trial transcript reflects that at no point during the State's direct examination was C.A. asked if he consented to Connie Apfel striking or hitting him. At no point did C.A. testify that he did not consent to being struck or hit by Connie Apfel. At no point did C.A. testify that he had no recollection of telling

[1] The circuit court gets this particular fact backward, writing in its decision that "When asked by Defendant's attorney whether she hit C.A., C.A. replied that he did not recall." (R.70.4; A.-App. 14). This finding of fact, while in error, does not appear to have played any significant role in Judge Vlack's decision and order. Had the defendant's attorney, in fact, asked C.A. whether the defendant had struck him, this appeal would likely not have been brought.

the officers that he did not consent to being struck or hit by Connie Apfel that evening. (R.51:107-10; A.-Appx. 15-18).

Finally, the trial transcript reflects that at no point during the State's direct examination was C.A. specifically asked if he experienced pain after Connie Apfel struck or hit him. At no point did C.A. testify that he experienced pain after being struck or hit by Connie Apfel. At no point did C.A. testify that he had no recollection of telling the officers that he experienced pain after being struck or hit by Connie Apfel that evening. *Id.*

After C.A.'s testimony the State called Officer Ryan Miller of the River Falls Police Department. When Officer Miller began to testify with regard to statements that C.A. made to him on the evening in question, defense counsel objected and a rather lengthy argument concerning that objection took place:

> Q And did you speak with the defendant, Ms. Apfel, about the blood on [C.A.'s] face?
>
> A. Yes I did.
>
> Q. What did she tell you?
>
> A. Initially, she informed me that nothing had happened; she didn't do anything and [C.A.] did not do anything. Throughout our investigation, we did split both parties up. Officer Kober went and spoke with [C.A], as I spoke with Connie. Officer Kober informed me he had more information for me about what he had learned from [C.A]. At that point I did go out into the hallway with [C.A] and spoke with him, [C.A], directly myself about what had happened. At that point, [C.A] did inform me that –
>
> MR. HARRELSON: I would - Judge, this is getting towards hearsay, if we're talking about what [C.A] informed –
>
> THE COURT: Would you approach, please?

(Court and counsel confer off the record.)

THE COURT: Ladies and gentlemen, I need to speak to the attorneys for a few more minutes. Again, I appreciate your patience. If you'd please go out with the bailiff.

THE WITNESS: Yes, Your Honor.
(Jurors exit courtroom.)

THE COURT: If you'd please have a seat in the hallway, officer, we'll get back to you in a minute.

THE WITNESS: Yes, Your Honor.

(Witness exits courtroom.)

THE COURT: Have a seat everybody. Okay, we're outside the presence of the jury. Go ahead, gentlemen.

MR. HARTUNG: Judge, I think his statements as to what [C.A] said are admissible based on prior inconsistent - prior inconsistent statements. It's not hearsay. I would note State v. Lenarchick, L-E-NA-R-C-H-I-C-K, 74 Wis 2d. 425 (1975), which states, "A witness's claimed non-recollection of a prior statement may constitute inconsistent testimony."[2]

Judge, the witness in this case - and I asked him thoroughly on my direct exam if he recalled giving certain statements to the officers, to which he said he did not recall.

I believe that that constitutes as prior - under the prior inconsistent statements and it would not be hearsay and admissible in this court.

THE COURT: Mr. Harrelson?

MR. HARRELSON: Judge, I think that the statutes clearly address this. This is addressed in Section 906.13, prior statements of witnesses. In examining a witness concerning a prior statement made by the witness, whether written or

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[2] ***State v. Lenarchick***, 74 Wis.2d 425, 436, 247 N.W.2d 80, 87 (1976), held that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." While the circuit court was neither asked nor explicitly made such a finding of bad faith at trial, Ms. Apfel did not raise this issue and conceded at the motion hearing that the record would support such a finding. (R.73:3). See, ***State v. Martwick***, 2000 WI 5, ¶ 31, 231 Wis.2d 801, 604 N.W.2d 552 ("[I]f a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision.").

not, the statement may not be shown, et cetera, but on request the same shall be shown or disclosed.

Then there's extrinsic evidence of prior inconsistent statement of a witness is addressed in subdivision - subsection (2). The extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable.

This is extrinsic evidence of a prior incon statement - prior inconsistent statement of the witness, which is [C.A.]. So, Your Honor must find that one of these three things applies: either the witness was so examined while testifying as to give the witness an opportunity to explain or deny the statement.

And, if [C.A.] - this is an inconsistent - this is extrinsic evidence of the statement. We need to have [C.A.] in here hearing this so that he has the opportunity to be cross-examined as to the statement that is about to be given.

I don't - that's properly a matter for the direct examination of [C.A.], not for bringing it in through this officer.

MR. HARTUNG: Judge, and if I may? He's testified he doesn't remember. We ***- I asked him questions about everything I was planning on asking him that night, all the circumstances. His testimony is he doesn't remember.***

THE COURT: ***So, was he ever asked if he was given - had given a statement to the police?***

MR. HARTUNG: ***I asked him if he remembered giving - I - I specifically asked him - first I asked, "Did such-and-such happen?" He said, "I don't recall." Then I rephrased my question as, "Do you remember telling police that such-and-such happened?" "I don't recall."***

THE COURT: ***Was that question asked?***

MR. HARTUNG: ***Yes, many times.***

MR. HARRELSON: And Judge, it's my position that the extrinsic evidence would be what's brought in - in impeachment of [C.A] while he's testifying, not that we call a police witness to offer this as hearsay. We need - it is clearly hearsay evidence, Judge, and we need, therefore, a definition that it is not hearsay.

The statement is - and so looking at the 908.01 definitions, a statement - statements which are not hearsay –

THE COURT: Well, an inconsistent statement is not hearsay.

MR. HARRELSON: That's right, Judge, but it's - in this case, he's already been asked about that prior inconsistent statement and it - didn't you tell River Falls Police that - he's already been asked about that prior inconsistent statement and I don't believe he gets to come in now through this witness as - because this witness is not the declarant of the statement. That's essentially the problem, Judge. This witness is not the declarant of the statement and it's being

brought in extrinsically to shore up what Mr. Hartung has already offered when he asked him - when he asked [C.A.] about this.

MR. HARTUNG: It's - it doesn't matter who the declarant is. It's not hearsay.

THE COURT: Okay. First of all, under 908.01(4), statements which are not hearsay includes a prior statement by a witness, and it says the declarant, [C.A], testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with declarant's testimony.

So, it's not whether he's subject to direct examination, it's subject to cross-examination, which he was.

MR. HARRELSON: But the statement has already been brought in when it was addressed to [C.A]. "[C.A], did you tell River Falls Police that?" And there we have it, so there - there's the statement, it's brought in, and I have cross-examined [C.A] on that, but now we have a different issue.

Now we have a different witness offering - offering what's hearsay and what - what this witness says [C.A] said has not been brought to - [C.A] isn't subject to cross-examination on that because [C.A] isn't here anymore.

THE COURT: But, if you - okay, but he's not been excused. He's still under subpoena. That's why I asked the question. Is this person excused? He's not. He's still here.

The questions I recall being asked of [C.A] ***were not specifically what he told the officer, unless I'm missing something.***

MR. HARTUNG: ***Judge, I asked him about specific portions of specific factual allegations that the complaint entails and that according to the officer's report. First, I asked him to give a statement as to whether or not, for an example - and I don't know if this is what the testimony was, I'm using it strictly as an example - Did you drink that night? I don't recall. Did you give –***

THE COURT: ***Let me ask the question, gentlemen, because I'll be very, very - more blunt. Was he ever asked either on direct or cross-examination, "Did you ever give a different statement to the police department?"***

MR. HARTUNG: ***I asked him if he recalled giving those statements to the - giving certain –***

THE COURT: ***That's not my question. That's not my question. I'm not asking, was he asked things about what he told the police. Was he asked, specifically, "Did you ever give a statement to the police that said such-and-such?"***

MR. HARTUNG: ***Yes, I did - but I never phrased it, "Did you ever tell the police something different?"***

THE COURT: ***That's why I'm asking - that's why my question is so specific, because it was never –***

MR. HARTUNG: ***Those questions were asked, Judge.***

THE COURT: ***Okay. I want to make sure we're very clear. So you are telling me that you said, "***[C.A]***, did you tell the River Falls Police Department blah, blah, blah?" I don't recall any question like that.***

You may have asked, "Did you say you were drunk? Were you hit?" which might have been part of the statement allegedly given to the River Falls Police Department, but I don't recall any question.

MR. HARTUNG: ***My question - I'll give you an example, Judge, of the pattern of questions I used, and then I'll leave it to you to make your determination. "Did you and Connie get into an argument that night?"***

THE COURT: ***That's not - and again*** –

MR. HARTUNG: ***"I don't recall." And then my follow up question, Judge, was, "Do you remember telling police officers that you did?"***

THE COURT: ***Okay***.

MR. HARTUNG: ***"I don't recall." That was the pattern of question and answer that I used on [C.A].***

THE COURT: ***Mr. Harrelson?***

MR. HARRELSON: ***I don't have a clear recollection, Judge, of what Mr. Hartung asked. I have to be honest about that.***

THE COURT: Okay. Again, 908.01 says, it's not hearsay if it's an inconsistent statement and the person is subject to cross-examination, which he was.

And 906.13(2) says, "Extrinsic evidence of a prior inconsistent statement is not admissible unless any of the following is applicable: one, the witness was so examined while testifying as to give the witness an opportunity to explain or deny the statement; two, the witness has not been excused from giving further testimony in the action.

He hasn't been excused. And it says you can't do it unless any of the following are applicable, and he's not been excused.

MR. HARRELSON: So, Judge, how do we - how do I - how do we address this? We bring him back in and we say an officer just testified in court that you said this to him.

THE COURT: Somebody could recall him later, but again, the issue is whether or not this officer can testify about what [C.A.] supposedly told him.

> You raised the point it's extrinsic. Yes, it is but this says it doesn't come in unless, he hasn't been excused. He's subject to cross-examination.
> So, unless you show me something else, as far as I'm concerned, under these two sections the officer is allowed to testify about what [C.A.] told him for the reasons I stated.
>
> [C.A.] has not been excused. He's subject to cross-examination and he was subject to cross-examination.
>
> MR. HARRELSON: Judge, I'll accept your ruling, if I may maintain my objection.
>
> THE COURT: Well, your objection is noted and you're not giving up your argument, but all I'm telling you is that based upon these statutes - and I appreciate the argument that it's extrinsic. Yes, it is. But, again, it's not hearsay, because he was subject to cross examination, and B., he's not been excused.
>
> ***Now, I have to admit I don't have the same recollection whether or not the questions were asked exactly how Mr. Hartung phrased***, but even if not, as long as he hasn't been excused 906.13(2)(a) is not violated, and again, it's not hearsay. So, I'll allow the officer to testify, but you've got to be careful. This officer is going beyond the questions asked, and there hasn't been an objection, but I'll just leave it at that.
>
> MR. HARTUNG: No - and - and I realize that, Judge.
>
> COURT: Okay. Okay. Okay, we'll bring the jurors back in. Then we'll bring the officer back in.

(R.51:144-54; A.-Appx. 19-29) (emphasis added). When Officer Miller came back into the courtroom he testified as follows:

> MR. HARTUNG, CONTINUING:
>
> Q. Officer, before that last break I think we were discussing when you left Connie to go and speak with [C.A.]. Does that sound familiar?
>
> A. Yes.
>
> Q. Okay. I'd like to focus on the conversation you had with [C.A.] at that time. What did he say to you?
>
> A. Basically, he informed me that he had been seeing another woman. At that point, Connie was upset with him and hit him because she was mad.

(R.51:154; A.-Appx. 29).

Officer Miller also testified as to statements made by [C.A.] regarding whether he consented to being struck or hit by Connie Apfel and whether he felt pain:

> Q. Do you know if [C.A.] gave Connie permission to strike him?
>
> A. I overheard, while Officer Kober was going through the victim domestic abuse packet with him, that he did not give permission to strike.
>
> Q. Do you know if the punch hurt [C.A.]?
>
> A. From overhearing –
>
> MR. HARRELSON: Judge, I would object on the grounds of hearsay. I don't believe this was covered earlier.
>
> THE COURT: Okay. I've ruled on that. You may answer the question.
>
> THE WITNESS: I overheard the conversation and that, yes, it did hurt.

(R.51:159-60; A.-Appx. 30-31).

Officer Christopher Kober of the River Falls Police Department was the third witness to testify for the State. He also testified as to prior statements of C.A. regarding whether he had been in a physical altercation with the defendant:

> Q. And did you speak with [C.A.] regarding what happened.
>
> A. Yes.
>
> Q. What information did he give you?
>
> A. He had stated that Connie and him had gotten into a physical altercation because she had found out that he had an old lady in Eau Claire that he was dating on the side and she attacked him.

(R.51:171; A.-Appx. 32). Later, Officer Kober, gave further specifics regarding statements made by C.A. concerning the attack, whether C.A. consented to the attack, and whether he experience pain:

Q. I would like to draw your attention back to [C.A.]. Did he describe to you the ways - strike that. I think earlier you testified that [C.A.] was attacked by Ms. Apfel, does that sound correct?

A. Yes.

Q. Did he describe for you the ways in which he was attacked?

A. Ah, it was a one-time thing. He said that he got punched, kicked, shoved, pushed, slapped with open hand, scratched. I think that was about all of it right there. I think he got punched -

Q. Did he indicate to you as to whether or not he gave Ms. Apfel permission to do that?

A. He did not give permission.

Q. And, did he indicate to you as to whether those actions caused him pain?

A. They did cause him pain.

Q. And you know that because -

A. He stated that.

(R.51:176; A.-Appx. 33).

At the close of the State's case, counsel for the defense moved for a judgment of acquittal, arguing that there was insufficient evidence to support verdicts of guilt for the charges asserted. (R.51:184; A.-Appx. 34). The Court denied the motion, stating the following grounds:

> THE COURT: Okay. Okay, first of all, with regard to the battery. You've got to show four elements. Bodily harm to [C.A], there was testimony there was harm and that it caused pain. Intended to cause - question for the jury. Without consent - that was specifically stated. Defendant knew he did not consent - it's up to the jury. Self defense, in my opinion, is probably going to be a question for the jury.
>
> So, in my mind, there's a prima facie case. Whether it's beyond a reasonable doubt, that's not my decision at this point in time. So, as to the battery, that's denied. Disorderly conduct. Engage in abusive, otherwise disorderly conduct under circumstances tending to cause or provoke a disturbance. The testimony, again, the

> evidence - not a lot, but let's just say there appeared to be an altercation. I'll leave it at that. And it was in a private place; it's in a hotel or motel room. Again, did it tend or cause or provoke a disturbance - a question for the jury. Prima facie. Motion is denied.

(R.51:185-86; A.-Appx. 35-36).

Ms. Apfel was subsequently found guilty by the jury on all three counts charged in the criminal complaint. (R.26, R.27, R.28; A.-Appx. 8-10). Sentencing was held on December 19, 2014. (R.47). The circuit court withheld sentence on Counts 1 and 3, and placed Ms. Apfel on three years of probation for Count 1 and two years of probation for Count 3. Conditions of probation included ninety (90) days conditional time, of which 10 days were to be served on consecutive weekends in February and eighty (80) days were stayed. (R.33:1-4; A.-Appx. 1-4). A jail sentence of ninety (90) days was imposed and stayed on Count 2, and Ms. Apfel was placed on three years of probations for Count 2. Conditions of probation again included ninety (90) days conditional time, of which 10 days were to be served on consecutive weekends in February and eighty (80) days were stayed. (R.33:5-7; A.-Appx. 5-7). On December 29, 2014, Ms. Apfel filed her Notice of Intent to Pursue Post-Conviction Relief. (R.34). And on January 30, 2015, the circuit court stayed all of the conditional time pending appeal. (R.49:5).

On September 28, 2015, Ms. Apfel filed her motion for post-conviction relief. (R.63). A hearing was held on that motion on December 21, 2015. (R.73). There was no testimony taken at the hearing, as all facts pertinent to the motion

could be ascertained from the record. (R.73:3) Oral argument was made, however. (R.73). During that oral argument, there was questioning by the circuit court to Ms. Apfel's counsel, as to exactly what questions Ms. Apfel asserted needed to be asked to lay an adequate foundation for admitting the prior statements of C.A. as "prior inconstant statements." (R.73:15-19; A.-Appx. 37-41). Ms. Apfel's response, through counsel, was that while "I do not recall" can, pursuant to ***State v. Lenarchick***, 74 Wis.2d 425, 247 N.W.2d 80 (1976), constitute an inconsistent statement, you still need to examine the question(s) asked to determine what that statement is inconsistent with, and that those questions must at the very least cover the elements of the crime. *Id.*

After the hearing, the State filed a written response to the defendant's motion on December 28, 2015, and Ms. Apfel filed a reply to that response on December 30, 2015. (R.68 and R.69). On January 12, 2016, the circuit court entered its decision and order denying Ms. Apfel's post-conviction motion. (R.70; A.-Appx 11-14). The circuit court's analysis of the law and facts was as follows:

> At trial the State submitted and Defendant in her motion accepted that *State v. Lenarchik* stands for the proposition that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." 74 Wis.2d 425, 436, 247 N.W.2d 80, 87 (1976).
>
> The key argument that the Defendant makes in her motion is that Officer Miller's and Officer Kober's testimony should not have been admitted. At trial this Court ruled that Officer Miller's and Officer Kober's testimony regarding C.A.'s statements to them was admissible. This Court still concludes that their testimony is admissible.
>
> C.A. was understandably a very reluctant witness for the State. On the stand, C.A. recalled very few details of the incident with the Defendant. While this Court

> perhaps did not explicitly find C.A.'s lack of recall to be in bad faith, the record supports such a conclusion. As *Lenarchik* makes clear, if a witness denies recollection of a prior statement, which C.A. did in this matter [Trial Transcript, pp. 104-138], then the Court may consider that testimony inconsistent. C.A. testified that he did not recall talking with the Officers Miller and Kober. He testified he did not recall what he told Officers Miller and Kober. He also testified he did not remember telling the police why he called them. This, in this Court's opinion, is a denial of a past statement, meaning that it can be considered an inconsistent statement.
>
> Pursuant to § 908.01(4)(a)1 it is not hearsay if the statement is a witnesses' prior inconsistent statement. Under *Lenarchik*, statements may be inconsistent if the statement at trial is that the witness does not recall what was previously stated. That is precisely the situation in this case. The statement introduced through Officer' Miller and Kober's testimony was extrinsic, however, as this Court pointed out at trial, C.A. was never released from his subpoena and was available to testify, satisfying the requirements of Wis. Stat. § 906.13(2)(a)2. The Defendant's motion is, therefore, denied.

(R.70:3-4; A.-Appx 13-14). Eight days thereafter, Ms. Apfel filed her notice of Appeal. (R.71).

VI. Argument.

A. The admission, over objection, of testimony by the police officers that the victim/witness C.A. had told them that the defendant had hit C.A., that he did not consent to being hit, and that he felt pain upon being hit, was error, in that the State did not lay a proper foundation for the admission of these prior statements as "prior inconsistent statements."

Standard of Review

This case involves the review of an evidentiary ruling of the circuit court. The standard of review applicable to evidentiary rulings is:

> The admission of evidence lies within the sound discretion of the circuit court. ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct.App.1982). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (1995). In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. See ***Vogel v. Grant–Lafayette Elec. Coop.***, 195 Wis.2d 198, 209, 536 N.W.2d 140, 144 (Ct.App.1995) (rev'd on other grounds) (noting that we may reverse a discretionary decision which was based on an erroneous view of the law). Therefore, we review de novo whether the evidence before the circuit court was legally sufficient to support its rulings. ***State v. Hanna***, 163 Wis.2d 193, 204–06, 471 N.W.2d 238, 244 (Ct.App.1991). Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial. See ***State v. Patricia A.M.***, 176 Wis.2d 542, 557, 500 N.W.2d 289, 295 (1993).

State v. Keith, 216 Wis.2d 61, 68-69, 573 N.W.2d 888 (1997).

The seminal case for harmless error analysis is ***State v. Dyess***, 370 N.W.2d 222, 124 Wis.2d 525 (Wis., 1985), wherein the Wisconsin Supreme Court wrote that:

> We conclude that, in view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether of omission or commission, whether of constitutional proportions or not, the test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result.

Id. at 370 N.W.2d at 231-32, 124 Wis.2d at 543. This test is actually stricter than the words "reasonable possibility" might at first blush suggest. "[W]hen error is committed, a court should be sure that the error did not affect the result or had only a slight effect." *Id*. at 370 N.W.2d at 230, 124 Wis.2d at 540. According to the ***Dyess*** court:

> The only reasonable test to assure this result is to hold that, where error is present, the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be de minimus. This test has been adopted in ***State v. Poh***, 116 Wis.2d 510, 529, 343 N.W.2d 108 (1984); ***State v. Burton***, 112 Wis.2d 560, 571, 334 N.W.2d 263 (1983); ***State v. Billings***, 110 Wis.2d 661, 667, 329 N.W.2d 192 (1983).

Id. at 370 N.W.2d at 231, 124 Wis.2d at 541-42. And in further explanation of the proper analysis of harmful error the Wisconsin Supreme Court has written:

> Our harmless error analysis requires us to determine whether the error in question affected the jury's verdict. ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485. Therefore, we ask, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. U.S.***, 527 U.S. 1, 18 (1999)).

State v. Rocha-Mayo, 2014 WI 57, ¶23, 355 Wis.2d 85, 848 N.W.2d 832 (2014).

Finally, the ***Dyess*** court held that:

> "[t]he burden of proving no prejudice is on the beneficiary of the error, here the State. ***Billings***, 110 Wis.2d at 667, 329 N.W.2d 192.[3] The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction."

Dyess, at 370 N.W.2d at 32, 124 Wis.2d at 543.

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[3] ***State v. Billings***, 110 Wis.2d 661, 667, 329 N.W.2d 192 (1983).

Law and Analysis

There is actually very little disagreement in this case as to what the applicable law is, and what the appropriate statutes and cases state. There is really no dispute to the facts either. The dispute is in the application of the law to the facts. In this case, we have a victim/witness, C.A., who during the investigation of a domestic disturbance made statements to police officers about the actions of the defendant, Connie Mae Apfel. (R.51:154, 159-60, 171 and 176; A.-Appx. 29-33). Specifically, C.A. purportedly told the officers that the defendant had hit him, that he did not consent to being hit, and that he experienced pain when hit. *Id.* These are all elements to the crime of misdemeanor battery,[4] and would support the elements of the crime of disorderly conduct.[5] At trial, C.A. claimed not to remember many of the events of the evening in question. (R.51:107-10; A.-Appx.

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[4] Wis. JI-Criminal 1220 (2015), list the following elements of the crime of misdemeanor battery:

1. The defendant caused bodily harm to (name of victim).
   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.
   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.'
2. The defendant intended to cause bodily harm to [(name of victim)] [another person].
   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.
3. The defendant caused bodily harm without the consent of (name of victim).
4. The defendant knew that (name of victim) did not consent.

[5] Wis. JI-Criminal 1900 (2012), list the following elements of the crime of disorderly conduct:

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

15-18). However, he was never asked at trial if the defendant had hit him, whether he consented to being hit, or whether he felt pain when hit.

The general rule, of course, is that "hearsay is not admissible except as provided by [Chapter 908, Wis. Stats.] or by other rules adopted by the supreme court or by statute." Section 908.02, Wis. Stats. A hearsay statement is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 908.01(3), Wis. Stats. However, Section 908.01(4)(a)1., Wis. Stat., provides that "A statement is not hearsay if ... [it is a] Prior statement by witness ... [and] The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... Inconsistent with the declarant's testimony." Section 906.13(2)(a)2., Wis. Stat., provides that "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable ... The witness has not been excused from giving further testimony in the action." Further, the State is corrected in citing ***State v. Lenarchick***, 74 Wis.2d 425, 436, 247 N.W.2d 80, 87 (1976), for the proposition that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence."

Where Ms. Apfel and the circuit court part ways is whether the following in-court statements of C.A. are, in fact, inconsistent with C.A.'s prior statements to the officers that Ms. Apfel hit him, that he did not consent to being hit, and that he experienced pain when she hit him:

Q. Do you remember talking with them?

A. No I don't.

...

Q. Do you remember what you may have told them?

A. No I don't.

...

Q. Do you remember telling the police why you called them?

A. No, I don't.

(R.51:107-10; A.-Appx. 15-18). These were the three questions upon which circuit court rested its decision. (R.70:3-4; A.-Appx 13-14) ("C.A. testified that he did not recall talking with the Officers Miller and Kober. He testified he did not recall what he told Officers Miller and Kober. He also testified he did not remember telling the police why he called them. This, in this Court's opinion, is a denial of a past statement, meaning that it can be considered an inconsistent statement."). Ms. Apfel contends that these questions do not lay an adequate foundation for admitting the prior statements that the State wished to enter into evidence, namely, that Ms. Apfel had hit C.A., that he did not consent to being hit, and that he felt pain when hit.

The words "I do not recall" do not, in and of themselves, provide any information as to what the declarant fails to recall. To properly understand the statement, "I do not recall," it is necessary to examine the predicate question(s) which elicited that response. For example, "I do not recall" cannot be said to be a statement regarding whether the defendant had struck the victim/witness, unless the victim/witness is asked "did the defendant strike you?" Likewise, a witness's response of "I do not recall" to the question "did you talk to the police?" cannot be said to be a response regarding whether the defendant had struck the victim. The information rendered by the response "I do not recall" can address no more than the subject matter of the question which elicited that response.

Because C.A. was never asked if Ms. Apfel had struck him, whether he had consented to being struck, or if he had felt pain when struck, the defendant fails to see how C.A.'s response of "I do not recall" *to other questions asked by the State*, can be regarded as in-court statements of C.A. on these particular elements. Note that it is not the case that C.A. claimed to remember nothing. He testified that he remembered calling the police, that the police arrived at his residence, that he had been drinking, that he had not been smoking marijuana that evening, and that he did not observe Ms. Apfel smoking marijuana. (R.51:107-10; A.-Appx. 15-18). The statements the circuit court relied upon only evince that C.A. did not remember what he told the police or why he had called the police. That C.A. does not remember what he said to the police, or why he may have called the police,

does not *ergo facto* mean that C.A. could not remember whether Ms. Apfel hit him, whether he consented to being hit, or whether he felt pain.

"Unless required by the doctrine of completeness[6], an out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously." ***Wikrent v. Toys R Us, Inc.***, 179 Wis.2d 297, 309-10, 507 N.W.2d 130 (1993), overruled on other grounds in ***Steinberg v. Jensen***, 194 Wis.2d 439, 534 N.W.2d 361 (1995).

And yet, that is essentially what the trial court did. It took three statements in which C.A. claimed he had no recollection of talking to the police, and made that a Trojan Horse in which to carry any and all the statements which C.A. may have made to the police on that evening. Surely, the law requires more. If a person is to be convicted of a crime, the State should at least *ask* the victim/witness about the elements of the crime, i.e. did the defendant hit you? did you consent? did it hurt? before prior statements of victim witness come in.

In the final analysis, what this case is really about is inattention and whether that inattention should be excused. The error was not harmless. The prior statements of the victim/witness had a critical effect on the trial. Without these statements the State would not have had a prima facie case to survive the defense's

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[6] The reference to the doctrine of completeness is to Section 901.07, Wis. Stats., Remainder of or related writings or recorded statements. ***Wikrent***, 179 Wis.2d at 309-10. That statute is not at issue in this case.

motion for judgment of acquittal. (R.51:184-86; A.-Appx. 34-36). The State's ability to survive this motion, compelled the defense to put on their own case, and of necessity put Ms. Apfel on the stand.

No doubt it could be said that *if C*.A. had been asked, "did the defendant hit you? did you consent? did it hurt?" he would *probably* have responded "I don't recall." We don't know that, but it seems a reasonable wager. But if we accept this argument, then we will also be accepting that the courthouse has become a casino, where chance rules, and the law is a law of probabilities, and not the law of a free people.

No doubt, it could also be said that the prosecutor for the State had every intention of laying a proper foundation for the admission of the prior statements, and merely became confused at trial, and that is good enough. Indeed, his comments to the circuit court clearly indicate that he *thought* he had asked these questions, notwithstanding repeated expressions of doubt by the bench. (R.51:144-54; A.-Appx. 19-29). But good intentions are not enough. Laying the foundation for the admission of evidence is without doubt often tedious, and in the trial environment it is easy to become confused. But we are lawyers, and dotting the `i's and crossing the `t's is the essence of our profession. When we search for the truth we do it through the adversarial process of a trial. Our tool at trial is the asking of questions. We have no other tools, and it is that tool which must be mastered. We have rules governing the asking and answering of questions. And

sometimes, for certain kinds of questions, other "foundational" questions must be asked first. That is what happens at trials, we ask questions. Some questions must proceed other questions. In this case those questions were never asked.

VII. Conclusion.

Wherefore, the defendant would request that this Court vacate the defendant's Judgment of Conviction on the charges of battery and disorderly conduct and order a new trial, and order resentencing on the charge of possession of paraphernalia.

Respectfully submitted April 3, 2016.

Frederick A. Bechtold

State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7361 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated April 3, 2016.

Frederick A. Bechtold

State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by express mail on _____. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: _____

Signature: _____